

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Local Exchange Carriers' Rates,)
Terms, and Conditions for Expanded)
Interconnection for Special Access)

CC Docket No. 93-162

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NYNEX REPLY COMMENTS

The NYNEX Telephone Companies¹ hereby file their Reply to the Comments that were filed in response to Bell Atlantic's Petition for Clarification of the Common Carrier Bureau's decision in the *Supplemental Designation Order*² in the above-referenced proceeding.

In the *Supplemental Designation Order*, the Bureau stated that individual case basis ("ICB") arrangements are common carrier offerings and that, "[o]nce sufficient knowledge is gained about the costs of service, the Commission requires that the ICB rates be converted to averaged rates applicable to all customers."³ Bell Atlantic correctly points out that this statement could be

¹ The NYNEX Telephone Companies are New York Telephone Company and New England Telephone and Telegraph Company.

² *Supplemental Designation Order and Order to Show Cause*, DA 94-556, released May 31, 1994 ("Supplemental Designation Order").

³ *Id.* at para. 17.

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interpreted to contradict established Commission policy, as recently confirmed by the U.S. Court of Appeals.⁴ The Commission and the Court have made it clear that the mere filing of an ICB tariff does not turn a service into common carriage. Therefore, there is no rule that a carrier must convert services provided under ICB tariffs into generally available services under averaged rates.

Some of the commenters interpret the findings of the Commission and the Court as imposing an obligation on the local exchange carriers to file generally available tariffs for ICB services after they have gained "adequate experience" with a service to develop averaged rates.⁵ This is incorrect. As noted by some of the commenters, the Commission can require carriers to file averaged rates for a service only if it is a "common carrier" service. The standard for determining whether a service is common carriage or private carriage is whether the carrier has made the service generally available to all customers.⁶ In *Southwestern Bell Telephone*, the Court made it clear that ICB tariffs "do not automatically evolve into common carrier offerings"⁷ and that if a carrier "chooses its clients on an individual basis and determines in each particular case 'whether and on what terms to serve' and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service and the Commission is not at liberty to subject the entity to regulation as a common

⁴ *Southwestern Bell Telephone Co. v. FCC*, Nos. 91-1416 *et al.*, D.C. Cir. April 5, 1994.

⁵ See, e.g., MFS at pp. 6-7.

⁶ See *Southwestern Bell Telephone* at p. 14.

⁷ *Id.* at p. 18.

carrier.”⁸ The Commission can require a carrier to replace ICB tariffs with averaged rate tariffs only if the carrier has offered the service as common carriage, or if there is a regulatory requirement to offer it as common carriage. Therefore, it is irrelevant how much experience a carrier has with a service or how many ICB tariffs a carrier files for the service.


The comments in this proceeding illustrate the need for the Commission to grant Bell Atlantic’s request for clarification. The Commission should grant Bell Atlantic’s Petition for Clarification and it should make it clear the mere

⁸ *Id.* at p. 15.

filing of ICB tariffs for a service does not, in itself, impose a requirement on a carrier to file average rate tariffs for that service or to make the service available to all customers.

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Dated: September 13, 1994

CERTIFICATE OF SERVICE

I hereby certify that copies of this pleading were mailed this date, first class postage prepaid, upon the persons listed on the attached service list.



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